SUPREME COURT, U. S. FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 955

HELEN DOROTHY ZABEL, EXECUTRIX OF THE ESTATE OF ALFRED G. ZABEL, DECEASED, AND UNION TRUST NATIONAL BANK OF ST. PETERSBURG, FLORIDA, AND ED W. HARRIS, CO-EXECUTORS OF THE ESTATE OF DAVID H. RUSSELL, DECEASED,

Petitioners,

v.

R. P. TABB, COLONEL, CORPS OF ENGINEERS, DISTRICT ENGINEER, DEPARTMENT OF THE ARMY, JACKSONVILLE, FLORIDA, DISTRICT; STANLEY R. RESOR, SECRETARY OF THE ARMY; AND UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government's brief in opposition fails almost entirely to deal with the issues involved, and endeavors to sweep away petitioners' arguments with unfounded generalizations. This is done to such an extent that a short reply seems warranted to point out the basic misconceptions in the principal arguments advanced by the government.

1. As pointed out in the petition (pp. 8-9), § 10 of the Rivers and Harbors Act deals with obstructions to "navigable capacity"; accordingly, the heretofore unbroken interpretation of the Act has been that the granting of permits under it turns on whether the proposed work will interfere with navigation. The government would brush aside this purpose and consistent interpretation of the Act with the statement (Br. Opp. p. 8) that this Court "has on numerous occasions recognized that

considerations other than navigation may be weighed in granting, denying or revoking a permit under the Act." However, this Court has never so recognized, and it most certainly did not do so in the three cases cited by respondents (Br. Opp. p. 8).

The *Appalachian* case,[1] cited by respondents, has nothing whatever to do with the scope of the Secretary's authority under § 10 of the Rivers and Harbors Act; the portion of the opinion cited by respondents deals solely with the constitutionality of certain licensing provisions embodied in the Federal Water Power Act. See 311 U.S. at 419-22.

The *Sanitary District* case[2] is likewise devoid of support for respondents' assertion. The language referred to by respondents (266 U.S. at 425-26) has to do solely with the constitutional foundations for congressional authority over navigable waters. There is no indication anywhere in the opinion that the challenged action of the Secretary was based on "considerations other than navigation"; to the contrary, the Secretary had acted on the basis of "overwhelming evidence" that the state's withdrawal of water from Lake Michigan would "affect navigation." 266 U.S. at 430.

The third case cited by respondents, *United States* v. *Dern*,[3] is also wholly inapposite, for the reasons set forth in the petition (p. 8, n. 6).

2. Nor can the property rights granted to petitioners by the Submerged Lands Act be denied by question begging reference to the paramount servitude of the United States (Br. Opp. pp. 8-9) or by the assertion (*ibid.*, p. 8, n. 3) that "no taking of property could result" from the Secretary's denial of a dredge and fill permit "for

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[1] *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940).

[2] *Sanitary District* v. *United States*, 266 U.S. 405 (1925).

[3] 289 U.S. 352 (1933).

the simple reason that petitioners never had a right to fill in the navigable waters of the United States," citing *Scranton* v. *Wheeler*[4] and *United States* v. *Chandler-Dunbar Co.*[5] Under the Submerged Lands Act petitioners manifestly did have such a right, subject only to the paramount servitude reserved to the United States in that Act. As pointed out in the petition (pp. 16-17), and as the cases cited by respondents make clear, the paramount servitude of the United States over navigable waters has always been viewed as a power limited in its scope to the regulation and improvement of navigation. In the *Scranton* case, this Court stated that the title of a riparian owner in submerged lands is "a qualified title . . . to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by *the public right of navigation*." 179 U.S. at 163. (Italics added.) In the *Chandler-Dunbar Co.* case, this Court stated that title to the bed of a navigable river is "absolutely subordinate *to the right of navigation* and no right of private property would have been invaded if such submerged lands were occupied by structures *in aid of navigation* or kept free from such obstructions *in the interest of navigation*." 229 U.S. at 72. (Italics added.)

Respondents' attempt to invoke the navigational servitude of the United States thus utterly fails to support their assertion that petitioners never had the property right they claim. It also falls before the administrative finding that petitioners' "proposed work would have no material adverse effect on navigation." In the absence of justification for the Secretary's action on navigational grounds, petitioners are at least entitled to compensation for the denial of the only use to which their submerged property could be put. (See Pet. pp. 17-18.)

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[4] 179 U.S. 141 (1900).

[5] 229 U.S. 53 (1913).

CONCLUSION

For the reasons stated in the petition and this reply brief, the petition should be granted.

Respectfully submitted,

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